SECTIONS OF FEDERAL FOOD, DRUG, AND COSMETIC ACT INVOLVED IN VIOLATIONS REPORTED IN F. N. J. NOS. 23401–23450

Adulteration, Section 402 (a) (2), the article was a raw agricultural commodity and contained a pesticide chemical which is unsafe within the meaning of Section 408 (a); Section 402 (a) (3), the article consisted in part of a filthy or decomposed substance or was otherwise unfit for food; Section 402 (a) (4), the article had been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth; Section 402 (a) (5), the article was in whole or in part the product of a diseased animal or of an animal which has died otherwise than by slaughter; Section 402 (b) (1), a valuable constituent had been in whole or in part omitted or abstracted from the article; Section 402 (b) (2), a substance had been substituted wholly or in part for the article; Section 402 (b) (4), a substance had been added to the article or mixed or packed therewith so as to increase its bulk or weight or reduce its quality; Section 408 (a), a poisonous or deleterious pesticide chemical, or a pesticide chemical which is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of pesticide chemicals, as safe for use, had been added to a raw agricultural commodity, and no tolerance or exemption from the requirement of a tolerance for such pesticide chemical in or on the raw agricultural commodity had been prescribed by the Secretary of Health, Education, and Welfare.

Misbranding, Section 403 (a), the labeling of the article was false and misleading; Section 403 (c), the article was an imitation of another food and its label failed to bear, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated; Section 403 (g) (1), the article purported to be and was represented as a food for which a definition and standard of identity has been prescribed by regulations, and it failed to conform to such definition and standard; Section 403 (j), the article purported to be and was represented for special dietary uses, and its label failed to bear such information as the Secretary has determined to be, and by regulations prescribed as, necessary in order fully to inform purchasers as to its value for such uses.

BEVERAGES AND BEVERAGE MATERIALS *

23401. Canned Hi-C Orange-ade. (F. D. C. No. 29064. S. No. 82–212 K.)

QUANTITY: 630 cases, 12 cans each, at Charleston, W. Va.

SHIPPED: 2–4–50, from Dunedin, Fla., by Juice Industries, Inc.

LABEL IN PART: "Original Vitamin Hi-C Enriched Orange-ade Contents 1 Qt. 14 Fl. Oz. * * * Homogenized and Sterilized by the Mallory Method * * * One eight ounce glass of Hi-C Orange-ade contains 30 milligrams of vitamin C—the adult daily minimum requirement * * * Contents: Concentrated Orange Juice, Sugar, Dextrose, Water, Orange Emulsion, Citric Acid, Vitamin C, U. S. Certified Color."

RESULTS OF INVESTIGATION: Analysis showed that the article consisted of approximately: reconstituted orange juice 25 percent, sugar 9¼ percent, dextrose ½ percent, citric acid ⅛ percent, small amounts of orange oil emulsion and yellow coal-tar dyes, 30 milligrams of vitamin C per 8 ounces of beverage, and water (in excess of that required to reconstitute the concentrated orange juice declared on the label) 64½ percent.

*See also No. 23429.

LIBELED: 4–13–50, S. Dist. W. Va.

CHARGE: 402 (b) (4)—yellow coal-tar dyes had been mixed with the article so as to make it appear to be of better and greater value than it was; and, further, the article consisted of a mixture of reconstituted orange juice to which had been added water (in excess of that required to reconstitute the concentrated orange juice declared as an ingredient in the labeling of the article), sugar, dextrose, citric acid, and orange oil emulsion, which substances so added increased the bulk of the article and made it appear to be of better and greater value than it was; and 403 (a)—the label statement "Hi-C Vitamin Enriched" and the general design of the label (predominantly orange in color, bearing the words "Orange-ade" and a vignette depicting a glass of orange-colored liquid with a background of green leaves, resembling citrus leaves, and an orange blossom) were false and misleading in that they suggested and implied that the article was a vitamin-enriched beverage composed in whole or in large part of orange juice, whereas it was not such an enriched beverage; and the labeling was misleading also in that it failed to reveal the fact that the article contained only 25 percent of reconstituted orange juice and about 64.5 percent of water added in excess of that required to reconstitute the concentrated orange juice. (That fact was material in the light of the labeling statements and the general design of the label, which, as used on the 1-qt. 14-fl. oz. cans in which the article was packed, and displayed in retail grocery stores in juxtaposition or close placement to orange and other fruit juices packed in cans of similar size and shape, created the impression that the article was orange juice or its equivalent.)

DISPOSITION: Clinton Foods, Inc., New York, N. Y., successor to Juice Industries, Inc., claimant, filed an answer denying that the article was adulterated or misbranded as alleged. Thereafter, the claimant filed a motion for a change of venue, which the court, after hearing argument of counsel, denied on 10–6–50.

The claimant filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit and a petition for a writ of mandamus. The Government filed a motion to dismiss the appeal; and the court, after consideration of briefs and arguments, handed down the following opinion on 4–2–51, dismissing the appeal and denying the claimant's petition for a writ of mandamus:

PARKER, *Circuit Judge:* "We have here an appeal from an order denying, on the ground of lack of power, a motion to transfer a condemnation proceeding from one federal district to another and a petition for a writ of mandamus to require the judge below to exercise the power. In April 1950 the United States instituted a condemnation proceeding under the Federal Food, Drug and Cosmetic Act (21 USC 301 et seq.) in the United States District Court for the Southern District of West Virginia against 630 cases of orangeade found within the District, on the ground that the orangeade was both misbranded and adulterated within the prohibition of the statute. Clinton Foods, Inc., intervened as owner in the condemnation proceeding and filed answer denying the charges of misbranding and adulteration. It subsequently made a motion that the case be transferred for trial to the District of Maryland; but this was denied by the District Judge on the ground that he had no power to order the transfer. Appeal was taken from this denial of the motion and, in addition, Clinton Foods has filed a petition in this court asking a writ of mandamus against the District Judge on the ground that he had power to grant the motion and should have exercised his discretion in passing upon it. The United States has moved to dismiss the appeal on the ground that the order denying the motion to transfer is not a final order within the meaning of the statute allowing appeals to this court.

"The motion to dismiss the appeal must be allowed. Appeals to this court may be taken only from final decisions (28 USC 1291), except where appeal

from interlocutory orders in injunction, receivership, admiralty and patent cases is expressly authorized by statute (28 USC 1292); and an order granting or refusing the transfer of a case is clearly not a final decision nor is it an interlocutory order from which appeal is expressly granted. As said by this court in *Cox v. Graves, Knight & Graves, Inc.* 4 Cir. 55 F. 2d 217: 'A final decision is one which "puts an end to the suit, deciding all the points in litigation between the parties, leaving nothing to be judicially determined, with nothing remaining to be done, but to enforce by execution what has been determined." *France & Canada S. S. Co. v. French Republic* 2 Cir. 285 F. 290, 294; *U. S. v. Bighorn Sheep Co.* 8 Cir. 276 F. 710.'

"The precise question was before us in *Jiffy Lubricator Co. v. Stewart-Warner Corp.* 177 F. 2d 360, cert. den. 338 U. S. 947, in which an appeal from an order transferring a case was dismissed, and one of the grounds of the dismissal was that the order was not final and appealable. We said in that case:

> The motion to dismiss must be granted on the ground that the order transferring the case is not a final order from which an appeal lies under 28 USCA sec. 1291. As was said by the Supreme Court in *Arnold v. United States* for use of W. B. Guimarin & Co. 263 U. S. 427, at page 434, 44 S. Ct. 144, at page 147 68 L. Ed. 371: "It is well settled that a case may not be brought here by writ of error or appeal in fragments, that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction." *Hohorst v. Hamburg-American Packet Co.* 148 U. S. 262, 264, 13 St. Ct. 590, 37 L. Ed. 443; *Collins v. Miller*, 252 U. S. 364, 370, 40 S. Ct. 347, 64 L. Ed. 616; *Oneida Navigation Corporation v. W. & S. Job & Co.* 252 U. S. 521, 522, 40 S. Ct. 357, 64 L. Ed. 697; and cases therein cited. See also *Western Contracting Corp. v. National Surety Corp.* 4 Cir. 163 F. 2d 456; *Bowles v. Commercial Casualty Ins. Co.* 4 Cir. 107 F. 2d 169; *Hyman v. McLendon* 4 Cir. 102 F. 2d 189, 190; *Fields v. Mut. Benefit Life Ins. Co.* 4 Cir. 93 F. 2d 559, 561; *Lockhart v. New York Life Ins. Co.* 4 Cir. 71 F. 2d 684; *Toomey v. Toomey* 80 U. S. App. D. C. 77, 149 F. 2d 19.
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> The general rule is well settled that an order granting or refusing change of venue is not appealable unless expressly made so by statute. 3 C. J. p. 473; 4 C. J. S. Appeal and Error sec. 115; 2 Am. Jur. 899–900; *Shay v. Rinehart & Dennis Co.* 116 W. Va. 24 178 S. E. 272, and cases there cited. There is no federal statute expressly granting an appeal from such orders; and the federal decisions follow the general rule that they are not appealable. *Cook v. Burnley* 11 Wall. 659, 672, 20 L. Ed. 84; *Kennon v. Gilmer* 131 U. S. 22, 24, 9 S. Ct. 696, 33 L. Ed. 110.
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> Counsel for plaintiff rely upon decisions permitting appeals from dismissals in application of the principle of forum non conveniens; but these decisions are not in point. A dismissal in application of that or any other principle puts an end to the action and hence is final and appealable. An order transferring it to another district does not end but preserves it as against the running of the statute of limitations and for all other purposes.

"Nothing need be added to what was said in that case. It should be noted, however, that the same view has been taken in all other Circuits where the question has been raised. See *Koons et al. v. Kaiser et al.* 2 Cir. . . . F. 2d . . . (Oct. 6, 1950), cert. den. March 5, 1951, . . . S. Ct. . . ., 19 L. W. 3235; *Ford Motor Co. v. Ryan* 2 Cir. 182 F. 2d 329; *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.* 2 Cir. 178 F. 2d 866; *Paramount Pictures v. Rodney* 3 Cir. 186 F. 2d 111, 116; *Shapiro v. Bonanza Hotel Co.* 9 Cir. 185 F. 2d 777; *Holdsworth v. United States* 1 Cir. 179 F. 2d 933. Not only is it the law, we think, that an order granting or refusing the transfer of a case is not appealable; but this clearly should be the law. To permit appeals as of right from such orders would delay the administration of justice, unnecessarily in most cases, and would open the door to the evils of fragmentary appeals.

"Appellant relies upon the decision of the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.* 337 U. S. 541, in which was sustained the right to appeal from an order denying a motion to require plaintiff in a stockholders

derivative suit to give a bond for costs; but that case is clearly not in point. 'The right there asserted was in the language of the Supreme Court "separable from and collateral to [the cause of] action".' *Shapiro v. Bonanza Hotel, supra.* 'There is absent here a "final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it".' *Ford Motor Co. v. Ryan, supra.* See also *Paramount Pictures v. Rodney, supra.*

"Assuming without deciding that in a proper case this court has power to issue a writ of mandamus [1] to require a District Judge to exercise the discretion vested in him by the statute authorizing the transfer of cases (See *Roche v. Evaporated Milk Ass'n* 319 U. S. 21; *Paramount Pictures v. Rodney, supra,* 3 Cir. 186 F. 2d 111; *Ford Motor Co. v. Ryan, supra,* 2 Cir. 182 F. 2d 329), we think it clear that this is not a case in which the writ should be granted, as the District Judge was clearly right in holding that he had no power to transfer the case to the District of Maryland. As the case could not have been brought in any other district than that in which the goods sought to be condemned were found, there was no authority to transfer it to another district under 28 USC 1404 (a). Subsection (b) of that section, relating to transfers to other divisions of the same district, confers no such authority. And 21 USCA 334 (a), relating to the transfer of misbranding cases does not authorize the transfer, since condemnation is asked here on account of adulteration as well as misbranding.

"28 USC 1404 (a) provides:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

"The condemnation proceeding against the 630 cases of orangeade could not have been brought in any district other than the Southern District of West Virginia, for it was there that the property sought to be condemned was situate. It is well settled that a proceeding in rem against specific property is local in character and must be brought where the property is subject to seizure under process of the court. *Keene v. United States* 5 Cranch 304; *The Little Ann Fed. Cas.* No. 8397; *The Octavia Fed. Cas.* No. 10,422; *United States v. Three Hundred and Ninety-six Barrels Distilled Spirits Fed. Cas.* No. 16,502; *The Idaho* 29 F. 187, 192. See also 28 USC 1395 (b). Since the suit for condemnation of the 630 cases of orangeade could not have been brought in any other district than that in which they were seized, it is clear that it may not be transferred from that district under the provisions of 28 USC 1404 (a). *United States v. 23 Gross Jars etc. Enca Cream* 86 F. Supp. 824; *United States v. 11 Cases etc. Ido-Pheno-Chon* 94 F. Supp. 925; *United States v. 91 Packages etc. Nutrilite Food Supplement* 93 F. Supp. 763. As was well said by Judge Fake in the case last cited:

> There is no doubt but that the actions under consideration are civil actions, *Ex parte Collett* 337 U. S. 55, 69 S. Ct. 944, 959, 93 L. Ed. 1207, but are they such actions as might have been brought in any other districts than those in which they were brought? The answer is, no, because they were brought as actions in rem, and as such could be commenced only where the res was found at the time.

"And we think it equally clear that the case could not have been transferred to the Maryland District under 1404 (b). That section provides:

> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in

[1] It is clear that mandamus is not likely to be attended by the delays and other evils incident to fragmentary appeals, since mandamus must be promptly applied for, is granted only in the discretion of the court in aid of its appellate jurisdiction and will be awarded only when the lower court has refused to exercise its jurisdiction or has abused its discretion with regard thereto. Roche v. Evaporated Milk Ass'n, 318 U. S. 21, 26 et seq. Appeal, on the other hand, if it lies at all, lies as a matter of right and will stay the proceedings of the lower court while it is being prosecuted.

rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

"It is perfectly clear, we think, that this subsection authorizes transfer only between different divisions of the same district. The history of the subsection is thus stated in the Revisor's notes: 'Subsection (b) is based upon section 163 of title 28, USC, 1940 ed., which applied only to the district of Maine. This revised subsection extends to all judicial districts and permits transfer of cases between divisions.' These notes have been said by the Supreme Court to be 'obviously authoritative' (*United States v. Nat. City Lines* 337 U. S. 78, 81); and they make perfectly clear, what should be reasonably clear when reason is applied to the language of the statute itself, that the effect of the subsection is to authorize the transfer of in rem actions between divisions of the district, not to any other district of the country. This is the holding in all three of the district court decisions last cited.

"Nothing in 21 USC 334 (a)[2] authorizes the transfer asked. That section requires condemnation proceedings under the Food, Drug and Cosmetic Act for adulteration or misbranding to be brought within the district where the article is found. The proviso, which applies only to libels on account of misbranding, authorizes the limitation to a single proceeding of the proceedings which may be brought for misbranding and the removal for trial of such proceeding. It is significant that the proviso makes no such provision where condemnation is sought on the ground of adulteration, which is ordinarily more serious than misbranding and is more often the basis of a forfeiture of the property. There is no authority in the district court to remove a case under this proviso, as distinguished from consolidating a multiplicity of cases under sec. 334 (b), where adulteration is charged. *United States v. 74 cases etc. of Oysters* 55 F. Supp. 745. And the rule is not different because adulteration along with misbranding is charged in a single libel. *United States v. 11 Cases etc. Ido-Pheno-Chon* 94 F. Supp. 925.

"For the reasons stated, the appeal will be dismissed and the petition for writ of mandamus will be denied."

The claimant filed a petition in the Supreme Court of the United States for a writ of certiorari, which was denied on 10–8–51. Subsequently, it was found that the product had become unfit for human consumption or other use because of disintegration and corrosion of the interior of the cans, resulting from storage of the product for a period beyond its normal shelf life.

On 2–13–53, upon the joint motion of the parties, the court entered an order providing for the destruction of the product, with the understanding that

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[2] That section is as follows:

"Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, or which may not, under the provisions of section 344 or 355, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: Provided, however, that no libel for condemnation shall be instituted under this chapter, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this chapter based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal injunction, or libel for condemnation proceeding under this chapter, or (2) when the Administrator has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, reasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States Attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial."

the court had neither passed upon the allegations of the libel nor upon the contentions of the claimant with respect thereto, and that the order was without prejudice to these allegations and contentions.

23402. Canned boysenberry Nectarade. (F. D. C. No. 39268. S. No. 16–396 M.)

QUANTITY: 29 cases, 24 12-oz. cans each, at Seattle, Wash.

SHIPPED: 1–2–52, from Salem, Oreg.

RESULTS OF INVESTIGATION: Examination showed that the article was undergoing chemical decomposition.

LIBELED: 6–13–56, W. Dist. Wash.

CHARGE: 402 (a) (3)—contained a decomposed substance while held for sale.

DISPOSITION: 8–13–56. Default—destruction.

23403. Green coffee. (F. D. C. No. 38758. S. No. 11–510 M.)

QUANTITY: 41 bags at New Orleans, La.

SHIPPED: 10–6–55, from Vera Cruz, Mexico, by Casa Zardin S. A.

LABEL IN PART: (Bag) "Cafe Casa Zardin S. A. 16 de Septembre No. 28 70 Kilos Product of Mexico."

LIBELED: 11–15–55, E. Dist. La.

CHARGE: 402 (a) (2)—the article was a raw agricultural commodity and contained, when shipped, a pesticide chemical, namely, benzene hexachloride, which is unsafe within the meaning of the law since no tolerance or exemption from the requirement of a tolerance for such pesticide chemical on coffee has been prescribed by regulations.

DISPOSITION: 1–4–56. Consent—claimed by Hamburg American Line. 5,099 lbs. of coffee of the 6,232 lbs. actually seized was released as fit for food use after reconditioning by a burnishing and roasting operation.

CEREALS AND CEREAL PRODUCTS

BAKERY PRODUCTS

23404. Bakery products. (Inj. No. 212.)

COMPLAINT FOR INJUNCTION FILED: Between 5–18–49 and 7–1–49, E. Dist. Tenn., against the Chattanooga Bakery, Inc., Chattanooga, Tenn., and David A. Parks, president of the corporation.

CHARGE: The complaint alleged that the defendants, since about the year 1939, had been engaged in the manufacture of crackers and cookies and, since about the year 1945, had been introducing into interstate commerce such articles, which were adulterated as follows:

402 (a) (3)—the articles contained insect fragments, insect setae, adult insects, rodent hair fragments, hairs resembling rodent hairs, fly setae, rodent excreta pellets, and other filth; and 402 (a) (4)—the articles had been prepared and held under insanitary conditions at the defendants' Chattanooga plant.

DISPOSITION: The defendants filed an answer to the complaint on 7–1–49, denying that the products were adulterated. The matter came on for hearing on the motion for a preliminary injunction; and, on 11–10–49, the court handed down the following opinion: